No. _____

In the Supreme Court of the United States

EDWARD JOSEPH PARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 20, 2024

QUESTION PRESENTED

Federal Rule of Evidence 702(a) permits expert witness testimony only where the expert's "knowledge will help the trier of fact understand the evidence or to determine a fact in issue." Most courts hold testimony that vouches for a witness's credibility is not admissible under Rule 702 because it invades the jury's exclusive role to make credibility determinations. Some courts even hold that testimony which only implicitly touches credibility is properly excluded because it inevitably would encroach on the jury's role.

In *United States v. Salerno*, 506 U.S. 317, 312–22 (1992), this Court explained that courts "cannot alter evidentiary rules merely because litigants might prefer different rules in a particular set of cases." And in *United States v. Tome*, 513 U.S. 150, 166 (1995), this Court acknowledged the difficulties inherent in prosecuting cases involving child victims, but it reiterated the *Salerno* holding that evidentiary rules cannot be relaxed to make prosecution easier.

The question presented is: In a prosecution for aggravated child sexual abuse in which the alleged victim has inconsistently reported abuses, may the prosecution present expert testimony that such behavior is consistent with the alleged victim telling the truth, even though similar testimony is excluded when it would favor defendants because it "inevitably would encroach upon" the jury's exclusive role to determine the credibility of witnesses?

PARTIES TO THE PROCEEDINGS

Edward Joseph Parson was the defendant and appellant in the proceedings below.

The United States of America was the plaintiff and appellee in the proceedings below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

United States v. Parson, Case No. 4:21-CR-00112-CVE, Dkt. No. 145 (N.D. Okla. June 14, 2022), *aff'd*, No. 22-5056 (10th Cir. Oct. 24, 2023) (reported at 84 F.4th 930), *reh'g denied* (10th Cir. Nov. 18, 2023).

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PETITION FOR WRIT OF CERTIORARI

Edward Joseph Parson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Tenth Circuit is published in the Federal Reporter at 84 F.4th 930 (10th Cir. 2023). Pet. App., a001–a024. The Tenth Circuit's order denying rehearing and rehearing en banc is not reported. *Id.* at a028. The District Court's Judgment and Commitment is reproduced in the appendix. *Id.* at a045–a052.

JURISDICTION

The Tenth Circuit entered judgment on October 24, 2023. Petitioner timely sought panel rehearing and rehearing en banc. The Tenth Circuit denied panel and en banc rehearing on November 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix. Pet. App., a100.

INTRODUCTION

> Although the Government repeatedly denies that [its expert's] explanation of the disclosure process is meant to support the victims' credibility, that is plainly its principal purpose. Fearing the victims will appear confused, inconsistent, or dishonest on the witness stand, the Government hopes to combat that perception through 'expert' testimony purporting to show that signs of disorientation are in fact compatible with telling the truth. Federal Rules of Evidence 403 and 702 do not permit vouching of this kind.

United States v. Woody, 2015 WL 1851125, at *2 (D. Ariz. Apr. 22, 2015).

Cases involving child victims are always challenging. But that challenge does not permit courts to relax the Rules of Evidence to make it easier to obtain a conviction. When a child cannot tell the story of what happened to them in a consistent manner, when key details change for no apparent reason, the prosecution should not be allowed to bring in an expert witness to tell the jury that, not only is this

normal and consistent with telling the truth about abuse, but that it is itself evidence of abuse.

Imagine if, instead of a child victim, this was a criminal defendant. During the course of an interrogation, the defendant's story changes in a variety of ways. Some small, some big. Naturally, law enforcement views these alterations as evasive, evidence of lying, and potentially evidence of guilt. The defendant is charged. Prior to trial, the defense provides notice of its intent to present the testimony of an expert witness. This witness, who has decades of experience interviewing suspects, victims, and witnesses, will tell the jury that it is normal for people to provide conflicting information to police even when they do not mean to do so. This witness will tell the jury that this can occur for a variety of reasons, such as disorientation, trauma, stress, distrust of police, or a variety of other factors.

It should go without saying that the prosecution would object to this expert witness. The prosecution would argue that the witness will do nothing more than vouch for the credibility of the defendant's claims that he was not involved in the crime. Its purpose would be to have the jury disregard the inconsistencies and, instead, credit the defendant's claim of innocence. It would be equally unsurprising if a court excluded the expert for precisely that reason. If the rule is that expert testimony is impermissible even where it only impliedly vouches for credibility, such exclusion would be wholly proper.

That is the Tenth Circuit's rule, at least where defense experts are concerned. In a case where a defendant asserted that he falsely confessed to a crime, the Tenth Circuit upheld the exclusion of a defense expert whose testimony would have addressed the interrogation methods that can lead to false confessions. It reasoned that such testimony "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations." *United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008) (internal brackets and quotation marks omitted). The propriety of this rule is debatable, but it is the Tenth Circuit's rule.

But this rule must be applied evenly, and it must be applied without regard to the desirability of obtaining convictions in cases with child victims. In this case, the Tenth Circuit not only failed to follow this rule, but it completely ignored its existence. Instead, it adhered to the rationale of a Circuit Court of Appeals decision that predates this Court's ruling in *United States v. Salerno*, 506 U.S. 317 (1992), to hold that testimony of this nature is permissible in child sex abuse cases. When Mr. Parson sought rehearing, he notified the Tenth Circuit of this discrepancy, and it denied rehearing nonetheless.

This case presents an opportunity for this Court to resolve an important question: Whether experts in the behavior of individuals may testify that an individual's behavior is consistent with telling the truth. Such testimony aims to implicitly tell the jury that, not only is the behavior consistent with truth telling, it is evi-

dence that the allegation is true. Evidence of this nature is pervasive in child sex abuse cases, and it creates a great risk of convictions based, not on the evidence, but on the word of an expert who tells the jury they should believe a child even when they have numerous reasons not to. The consequences of such convictions are dire; the United States Sentencing Guidelines often establish a Guidelines range of life imprisonment, and the mandatory minimum sentence is thirty years in the custody of the Bureau of Prisons.

Granting certiorari in this case offers the Court an opportunity to reaffirm its rulings in *Salerno* and *Tome*, provide guidance to the lower courts regarding what constitutes impermissible vouching, and address a type of testimony that has the potential to deny defendants a fair trial in cases where they face sentences of extraordinary length.

STATEMENT

A. Factual Background

Edward Joseph Parson was in a romantic relationship with S.S.'s mother. When S.S. was seven-years-old, she claimed to her grandmother and aunt that Mr. Parson had been abusing her. *See* CA10 Record on Appeal (ROA) Vol. 3, at 212–13. A few days later, Mr. Parson's niece spoke with S.S. about her allegation, and S.S. claimed that her grandmother told her to say Mr. Parson was abusing her. *Id.* at 782–84.

S.S. was then forensically interviewed, and she denied being abused. S.S. claimed she lied because her mother told her to. *Id.* at 214–15, 291. While living with her grandmother, S.S. again disclosed abuse, and was again forensically interviewed. *Id.* at 176, 215–16, 314. Prior to this interview, a Department of Human Services employee told S.S. that "she was proud of her" and that if she said what happened one more time, she would not "have to keep repeating it over and over again." *Id.* at 730–32.

At the second forensic interview, S.S. disclosed physical abuse for the first time, and claimed that Mr. Parson would engage in oral sex acts with her. CA10 Sealed Supplemental Record on Appeal (Sealed Supp. ROA), Government's Exhibit 3.1. And at a third forensic interview, S.S. claimed Mr. Parson would "drown her in the bathtub," and that he choked her on at least twenty occasions. Sealed Supp. ROA, Government's Exhibit 5.1.

Mr. Parson was charged with Aggravated Sexual Abuse of a Child Under Twelve, in violation of 18 U.S.C. § 2241(c). At trial, the Government's opening statement was brief, but that brevity indicated the very simple premise upon which its entire case relied: "Only S.S. can tell you what the defendant did to her alone in the dark when no one was around to protect or to see." ROA Vol. 3, at 64. But it also introduced the role Rachel Murdock would play at trial. The Government explained that Ms. Murdock "works with child victims nearly every day" and she would help

the jury "understand childhood trauma," and "how children may disclose after they've been abused." *Id.* at 64. According to the Government, Ms. Murdock would give the jury "a foundation to understand child sexual abuse victims" before hearing from S.S. herself. *Id.* The Government's opening emphasized that the jury should "[f]ocus on S.S." and concluded by stating: "If you believe [S.S.], then the defendant is guilty." *Id.* at 63–66.

Ms. Murdock's trial testimony went as one might expect. The Government did not ask Ms. Murdock to directly address any of S.S.'s behaviors. Instead, it simply asked her to discuss certain, specific behaviors and why a child victim of sexual abuse might behave in that manner. Unsurprisingly, this discussion largely tracked S.S.'s own behaviors. Equally unsurprisingly, Ms. Murdock's testimony sought to explain how each of these behaviors was perfectly normal behavior from a child victim of sexual abuse and that they were consistent with the child telling the truth about being abused.

For example, Ms. Murdock explained that children only disclose to people they trust, and that such disclosures are a "process" rather a one-time event. *Id.* at 110–12. Ms. Murdock described this as being like "peeling the layers off of an onion." *Id.* at 112. She explained the various internal factors that might prevent a child from disclosing, such as embarrassment, shame, shyness, or a lack of understanding. *Id.* at 113. Ms. Murdock further explained external factors, like fear of

their abuser, that might prevent disclosure. *Id.* Ms. Murdock also told the jury that a child behaving normally around their abuser is common because children crave normalcy and will pretend the abuse did not happen to maintain that normalcy. *Id.* at 113–14.

Ms. Murdock also provided a statistical basis for believing children alleging abuse, explaining that "the research suggests that it's a four-to-one ratio"; a child is "four time more likely to omit details about things that happened" than to "make up something that didn't happen." *Id.* at 118.

With respect to delaying disclosure, Ms. Murdock's testimony explained that children often do not disclose quickly because doing so is uncomfortable, and that it is common for children to only tell a little bit of what happened at a time. *Id.* at 120–21. Ms. Murdock also testified that disclosures may evolve over time and that "peripheral details" are things children are more likely to forget or change. *Id.* at 125–26. Ms. Murdock further told the jury that some details, such as times and duration, are less likely to be recalled by a child because those are not details important to them. *Id.* at 129.

In closing arguments, the Government reiterated its key point: "[I]f you believe S.S., the defendant is guilty." *Id.* at 874. The Government relied upon Ms. Murdock's testimony in its closing, discussing concepts like peripheral and core details, discouraging the jury from discounting S.S.'s allegations due to her inconsist-

encies. *Id.* at 879–80. Tellingly, the Government described Ms. Murdock's testimony in this manner: "Rachel Murdock corroborated S.S.'s process of disclosure." *Id.* at 880.

The jury returned a verdict of guilty on the sole count. Mr. Parson faced a mandatory minimum sentence of thirty years' imprisonment. His Sentencing Guidelines range was Life, and the District Judge sentenced him to lifetime term of imprisonment. ROA Vol. 2, at 63; ROA Vol. 3, at 24, 36; Pet. App., a046.

B. Procedural History

A one-count Indictment charged Mr. Parson with a violation of 18 U.S.C. § 2241(c), Aggravated Sexual Abuse of a Child Under Twelve. ROA Vol. 1, at 20. Prior to trial, the Government submitted notice of its intent to call Rachel Murdock as an expert witness. *Id.* at 135–36. In turn, Mr. Parson filed a motion to exclude her testimony on a variety of grounds, including "vouching" in violation of Federal Rule of Evidence 702. *Id.* at 124–33. The District Court denied Mr. Parson's motion, noting that Ms. Murdock's anticipated testimony did "not amount to impermissible vouching for another witness' credibility." *Id.* at 188–89; Pet. App., a057–a058.

Mr. Parson persisted in his innocence and went to trial on the charge. The jury found Mr. Parson guilty. ROA Vol. 1, at 280. The District Court sentenced Mr. Parson to a term of life imprisonment. *Id.* at 304; Pet. App., a046.

Mr. Parson appealed to the Tenth Circuit, which affirmed after oral argument. Pet. App., a001–a024. In doing so, the panel's Opinion noted: "Murdock's testimony was limited to describing the general process of disclosure, the different types of disclosures, and the reasons why disclosures may vary depending on internal and external factors. Such expert opinions in child sex-abuse cases are appropriate and commonly accepted." *Id.* at a018. The Opinion supported this conclusion with citations to *United States v. Bighead*, 128 F.3d 1329, 1331 (9th Cir. 1997), and *United States v. St. Pierre*, 812 F.2d 417, 419 (8th Cir. 1987). *Id.* at a018. At no point did the panel's Opinion acknowledge its prior binding precedent in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008).

Mr. Parson sought panel and *en banc* rehearing. In his Petition for Rehearing, Mr. Parson pointed out three key factors: First, the contradiction between the panel's holding and that of *Benally*. Pet. App., a038–a041. Second, that *Bighead* did not meaningfully analyze the issue, as it dedicated only five sentences to its ruling that the evidence was admissible. *Id.* at a041–42. And finally, Mr. Parson pointed out that *St. Pierre* relied upon a rationale expressly rejected by this Court in *United States v. Salerno*, 506 U.S. 317 (1992), and *Tome v. United States*, 513 U.S. 150 (1995). *Id.* at a042–a043. Nonetheless, the Tenth Circuit denied rehearing. *Id.* at a028.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision condones a dangerous scenario with constitutional implications. Criminal defendants charged with heinous crimes—and already at a disadvantage before juries that want to protect children—must overcome expert testimony telling juries that a child victim's behavior is consistent not just with telling the truth, but also with being sexually abused. Even where the expert does not discuss the victim's behavior specifically, the expert's testimony cannot plausibly be relevant unless it is tailored to address behaviors exhibited by the victim. Thus, the jury is told that the victim's behaviors are consistent both with truth telling and being abused.

Under Federal Rule of Evidence 702, courts typically do not allow testimony that "vouches" for, or otherwise buttresses or bolsters, the credibility of a witness. As the Tenth Circuit explained in *United States v. Toledo*, "The credibility of witnesses is generally not an appropriate subject for expert testimony." 985 F.2d 1462, 1470 (10th Cir. 1993). Where expert testimony "does nothing but vouch for the credibility of another witness," it "does not assist the trier of fact as required by Rule 702." *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999).

Vouching can be direct, such as when Witness A explains why they believe Witness B is telling the truth. But it can also be indirect, such as when its only pur-

pose is to convince a jury it should believe a witness without explicitly saying as much. One district judge described vouching of this nature in this manner:

> Fearing the victims will appear confused, inconsistent, or dishonest on the witness stand, the Government hopes to combat that perception through 'expert' testimony purporting to show that signs of disorientation are in fact compatible with telling the truth.

Woody, 2015 WL 1851125, at *2.

What is the yardstick by which courts measure the admissibility of testimony that aims to bolster another witness's credibility? The answer to that question is not always clear. But the Tenth Circuit has said that where testimony "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations," it is properly excluded as vouching. *Benally*, 541 F.3d at 995 (internal brackets and quotation marks omitted). Yet the Tenth Circuit did not follow that rule in this case; it did not even acknowledge the rule exists.

I. THE TENTH CIRCUIT'S DECISION IS INCORRECT AND SEVERELY FLAWED.

At the outset, the Tenth Circuit's decision poses two clear problems. First, the Tenth Circuit's decision rests upon Eighth and Ninth Circuit decisions that are themselves flawed. One of those decisions is so brief in its analysis that it barely even qualifies as analysis. The other decision is in direct conflict with this Court's decisions in *Salerno* and *Tome*, which prohibit relaxing the rules of evidence for certain types of cases.

Second, the Tenth Circuit's decision reflects a pattern of subjecting prosecution expert witnesses to relaxed standards while subjecting defense experts to heightened standards. The Tenth Circuit's opinion completely disregards a principle that was directly on point with the issue at hand. Rather than wrestle with the conundrum that principle created, it chose to ignore it completely. The Tenth Circuit's trend of subjecting defense experts to heightened standards for admissibility raises the question of whether it is evenly applying its own rules. If it is not, the right to a fair trial and to present a complete defense is potentially being denied. Moreover, it reflects a further departure from the *Salerno* and *Tome* standard.

A. The Tenth Circuit's decision conflicts with this Court's holdings in *Salerno* and *Tome*.

With citation to *Bighead*, 128 F.3d at 1330–31, and *St. Pierre*, 812 F.2d at 419–20, the Tenth Circuit declared that testimony like Ms. Murdock's is "appropriate and commonly accepted." Pet. App., a018. But this reliance on *Bighead* and *St. Pierre* is misplaced.

In *Bighead*, the Ninth Circuit dedicated only a paragraph—five sentences—to its analysis of whether expert testimony like that of Ms. Murdock's was permissible. 128 F.3d at 1330–31. Its analysis does not stand well for the proposition that Ms. Murdock's expert testimony is appropriate under the Federal Rules of Evidence.

But the Eighth Circuit did give thought to the admissibility of this evidence in *St. Pierre*. 812 F.2d at 419–20. In concluding that expert testimony regarding the

behavior of child sexual abuse victims should be allowed, it identified four interrelated ideas: (1) "These cases present difficult problems for the jury. The testimony of the accused and the victim is generally in direct conflict"; (2) "[J]urors are at a disadvantage when dealing with sexual abuse of children"; (3) "[T]he common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse; and (4) "[T]he special concerns arising in the prosecution of child abuse cases have not been fully met by the development of new methods of practice." *Id.*

Of these, only the third idea reflects a proper basis for admitting expert testimony of this kind. The first two ideas implicitly condone allowing an expert to tell the jury who to believe simply because jurors are not equipped to make that decision themselves. That notion flies in the face of the view that jurors are the sole arbiters of credibility and that such a role is one of their most vital functions. *See Benally*, 541 F.3d at 995.

But the fourth idea is the most troubling. The fourth idea embraces the notion that, because of the challenges inherent in child sexual abuse cases, expert testimony should be allowed simply because it is the most expedient avenue to obtaining a conviction. In fact, when the first, second, and fourth ideas are read together, it becomes apparent that the holding in *St. Pierre* indicates the evidence would not be admissible but for the fact that child sexual abuses cases are different from other

criminal cases. Indeed, it appears that the Eighth Circuit's unstated concern was that it would be more difficult to obtain convictions in child sex abuse cases without testimony of this kind. Thus, it felt a need to relax the evidentiary rules to obtain more convictions.

It is at this point that *St. Pierre*'s holding is in direct conflict with this Court's rulings in *Salerno*, 505 U.S. at 322, and *Tome*, 513 U.S. at 166: Courts may not "alter evidentiary rules merely because litigants might prefer different rules in a particular set of cases." In relying on *St. Pierre* to conclude that testimony like Ms. Murdock's is "appropriate and commonly accepted," Pet. App., a018, the Tenth Circuit tacitly adopted the rationale of *St. Pierre*. Thus, the Tenth Circuit's decision stands in direct opposition to this Court's directive in *Salerno* and *Tome*.

B. The Tenth Circuit's decision conflicts with its own precedent and reflects a pattern of holding prosecution experts to lesser standards for admissibility than defense experts.

In *Benally*, the Tenth Circuit rejected a defense-sponsored expert witness in the field of false confessions. 541 F.3d at 995. The expert would have offered testimony regarding the frequency of false confessions and interrogation techniques that can cause them. *Id.* at 993–94. She would not have opined on the credibility of the defendant's claim that he made a false confession. *Id.* at 995. Nonetheless, a unanimous panel of the Tenth Circuit held that the district court properly excluded the expert's testimony because it "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations." *Id.* at 995. It noted that the

function of the expert's testimony would be the same as if the expert directly opined on the confession: it would direct the jury to "disregard the confession and credit the defendant's testimony that his confession was a lie." *Id.*

Ms. Murdock's testimony bears a striking resemblance to that of the *Benally* expert. Yet here, the Tenth Circuit not only disregarded the *Benally* ruling and the principle guiding it, but it did not even acknowledge its existence. The question that must be asked is: Why?

Unfortunately, the case before this Court is an example of the Tenth Circuit holding defense-sponsored experts to a higher standard for admissibility than prosecution-sponsored experts. Where a defense expert's testimony "inevitably would encroach" on the jury's role to make credibility determinations, the prosecution expert is merely providing important background information to help jurors understand the disclosure process of child sexual abuse victims.

The Tenth Circuit has repeatedly rejected expert testimony that would have been beneficial to defendants when such testimony calls into question the accuracy or reliability of a witness, or it would otherwise bolster a defendant's claims.

In *United States v. Stewart*, No. 22-7025, 2023 WL 6629579 (10th Cir. Oct. 12, 2023), the panel affirmed the exclusion of expert testimony regarding the effects of severe alcohol intoxication. *Id.* at *6–7. The panel recognized that the expert's testimony would have served two purposes: To establish the possibility of impeach-

ing the victim's testimony about events because of her drunken state and to support the defense theory that the defendant lacked specific intent. *Id.* at *6. The panel concluded that the bulk of the expert's testimony would fall within the average juror's common knowledge and experience. *Id.* at *6. It did so even though the Government previously put on testimony regarding whether the victim was "blackout drunk," and the defense expert would have addressed what it means to be blackout drunk. *Id.* at *2, *6. The *Stewart* panel further affirmed the district court's conclusion that he expert's testimony would invade the province of the jury to make credibility determinations because it would be used as a basis to impeach the victim's credibility. *Id.* at *7.

Petitioner has already discussed *Benally* extensively, but it too stands among those cases demonstrating a pattern of the Tenth Circuit holding defense experts to higher standards than prosecution experts when their testimony potentially influences credibility determinations.

The Tenth Circuit has also rejected expert testimony from defendants concerning the reliability of eyewitnesses. *See United States v. Wofford*, 766 F. App'x 576, 581–82 (10th Cir. 2019); *United States v. Smith*, 156 F.3d 1046, 1052–54 (10th Cir. 1998).

In *Wofford*, the Tenth Circuit affirmed a district court ruling that an expert in eyewitness reliability would not provide relevant testimony even though he

"would have educated the jurors to provide them tools by which they could assess the witness'[s] credibility or reliability." 766 Fed. App'x at 582. The panel explained that this testimony "would provide the jury with the same information as skillful cross-examination." *Id.* (internal quotation marks omitted).

In *Smith*, the Tenth Circuit affirmed exclusion of an expert in the field of eyewitness reliability, whose testimony would have discussed:

- [T]hat bright lights in a parking lot at night, as well as window tinting, could affect the ability to see and remember."
- [T]hat highly stressful events impair the ability to remember.
- [T]hat a person's confidence in his or her memory does not necessarily correlate to the accuracy of that memory.
- The "relation back" theory, "whereby an initial identification can influence a later identification."
- The "feedback factor, whereby post-event information may affect the accuracy of a memory."
- "[U]nconscious transference, which allows someone to remember a face but not the circumstances under which he or she saw the face."

156 F.3d at 1052. The Tenth Circuit rejected this testimony as not helpful to the jury—i.e., not relevant—because the topics for testimony encompassed "areas of com-

mon knowledge" to jurors and the eyewitnesses' reliability could be attacked "with skillful cross-examination." *Id.* at 1053.

If skillful cross-examination can properly expose the reliability of a witness's testimony, thus obviating the need for an expert, why can skillful direct examination not accomplish the same to reinforce a witness's testimony? Why does the Government need an expert witness to tell a jury that its victim's behavior is consistent with tell the truth about being abused? Why is an expert of this kind even allowed when the Tenth Circuit's decisions clearly indicate that expert witnesses whose testimony can be used to impeach or bolster credibility are properly excluded because their testimony does not assist the trier of fact?

The Tenth Circuit's rulings raise the specter of favoritism: The rule against expert testimony touching witness credibility seems to gain vitality when applied to defense experts and its vigor wanes when prosecution experts are challenged. When a defendant's expert would provide testimony that might influence a jury's decision on credibility, it risks "encroach[ing] upon the jury's vital and exclusive function to make credibility determinations," *Benally*, 541 F.3d at 995, but when it is an expert in the behavior of child sexual abuse victims, the testimony simply helps the jury understand why the victim's behavior should not be viewed as unusual for sexual abuse victims. Pet. App., a015–a018.

This favoritism is wholly inappropriate and risks denying defendants a fair trial and the right to present a complete defense. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the [Fifth] Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (internal quotation marks omitted)).

This pattern of decisions from the Tenth Circuit, combined with its reliance on *St. Pierre*'s fundamentally flawed rationale, indicates that it is in violation of this Court's directive in *Salerno* and *Tome*: Courts may not "alter evidentiary rules merely because litigants might prefer different rules in a particular set of cases." 513 U.S. at 166; 505 U.S. at 322. The Tenth Circuit is applying one set of rules for prosecution experts whose testimony touches credibility, and applying a different set of rules for defense experts who testimony would do the same, or even less.

This Court should grant certiorari in this case to address this inconsistency.

II. THE CONSEQUENCE OF A CONVICTION IN CHILD SEX ABUSE CASES IS EXTREMELY HIGH; COURTS SHOULD NOT RELAX EVIDENTIARY RULES TO MAKE THESE CONVICTIONS EASIER TO OBTAIN.

The stakes are extraordinarily high in child sex abuse cases, especially when the child victim is under the age of twelve. Defendants charged with violations of 18 U.S.C. § 2241(c) face a mandatory minimum sentence of thirty years in prison. Pet. App., a100.

Under the United States Sentencing Guidelines, defendants convicted of violation § 2241(c) have a Base Offense Level of 38. U.S.S.G. § 2A3.1(a)(1). Many defendants will receive a two-level enhancement because victims are usually in the custody, care, or supervisory control of defendants. *Id.* at § 2A3.1(b)(3). And because children rarely disclose abuse only occurring once, most defendants will also receive a five-level enhancement for engaging in a pattern of activity involving prohibited sexual conduct. *Id.* at § 4B1.5(b)(1). Defendants like Mr. Parson who find themselves subjected to each of these Sentencing Guidelines provisions receive an automatic Sentencing Guidelines range of Life because their offense level is 45; the Sentencing Table maxes out at 43.

Arguably, the stakes are only higher in cases where the charge is First-Degree Murder, where the mandatory minimum sentence is life in prison. With the stakes so high, this Court should not allow the Tenth Circuit to violate *Salerno* and *Tome* for the purpose of making convictions easier to obtain.

Defendants must be given equal treatment to the Government when it comes to the admissibility of expert witnesses. But the Tenth Circuit lowers the bar for prosecution experts. This case is a prime example of that favoritism in action. The Tenth Circuit ignored the existence of an inconvenient precedent that, if followed, would have compelled exclusion of Ms. Murdock's testimony. The Tenth Circuit buried its head in the sand and denied reality:

> Although the Government repeatedly denies that [its expert's] explanation of the disclosure process is meant to support the victims' credibility, that is plainly its principal purpose. Fearing the victims will appear confused, inconsistent, or dishonest on the witness stand, the Government hopes to combat that perception through 'expert' testimony purporting to show that signs of disorientation are in fact compatible with telling the truth. Federal Rules of Evidence 403 and 702 do not permit vouching of this kind.

Woody, 2015 WL 1851125, at *2.

CONCLUSION

WHEREFORE, Petitioner Edward Joseph Parson respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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